IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 18, 2006 Session

MARY JOE EARL HEADRICK v. WILLIAM H. HEADRICK, JR.

Direct Appeal from the General Sessions Court for Loudon County
No. 7858 Hon. William H. Russell, Judge

No. E2005-02657-COA-R3-CV - FILED OCTOBER 10, 2006

In this divorce case, the Trial Court granted the wife a divorce, awarded the wife separate property and divided what was determined to be marital property. The husband appealed and we affirm the Trial Court's Judgment as modified.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the General Sessions Court Affirmed, as Modified.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Ronald L. Grimm, and Mary L. Abbott, Knoxville, Tennessee, for appellant.

Terry G. Vann, Lenoir City, Tennessee, for appellee.

OPINION

This divorce action was initiated by the wife on December 22, 1999. On April 2, 2001, the Court entered an Order approving the Marital Dissolution Agreement, but on April 26, 2001, the husband moved to amend the Judgment asserting that he would be financially unable to continue paying the wife's health insurance after his retirement. The parties entered an Agreed Order to set aside the Final Decree of Divorce and set the case for trial on the merits.

Following the evidentiary hearing, the Trial Court entered its Finding of Facts and Opinion, and determined that the parties had lived apart for 20 years and had divided their personalty but not their real estate. The Court found the husband had made certain support payments to the wife

during the separation, and that the parties had purchased a tract of land in 1971, and conveyed a portion of that land to wife to be her separate property. The Court found the remainder of that land was marital property, and should be sold and the proceeds divided equally.

The Court also found the wife purchased a 4.9 acre tract of land at a tax sale in 1982 which adjoined the parties' other land, and that the husband claimed the parties bought the land, but the proof established the wife bought it for herself. The Court found that the parties' son attempted to show that the wife bought the land on his behalf, but that his testimony was not credible, and the Court concluded that the tract was the wife's separate property.

A further hearing was held on October 3, 2003, and a Final Decree of Divorce was entered on February 27, 2004. The Decree granted the wife a divorce on the grounds of inappropriate marital conduct by husband, and ordered that while the husband remained employed by the Postal Service, and until such time as wife began to receive benefits from the husband's Postal Service retirement, the wife would continue to receive 100% of the husband's military pension, minus the disability benefit. The Court ruled that after the husband retired, the wife would receive 50% of the husband's military retirement benefits, as well as 50% of the husband's Postal Service retirement pay, which the Court ordered would "vest in Wife, become a part of her estate and be alienable upon her death." The Court ordered that the husband would receive all the proceeds from his thrift savings plan with the Postal Service.

The Court also ordered that the portion of the parties' property which the husband deeded to the wife in 1993 would be the wife's separate property,[1] and the remainder of the property would be sold and the proceeds divided equally. The court found that the 4.9 acre tract which the wife bought from the Clerk and Master in 1982 was the wife's separate property, and the Court reserved the issue of attorney's fees.

An appeal was initiated by the husband, and this Court determined the appeal was premature and remanded the cause in our Opinion dated March 7, 2005.

Subsequently, the Trial Court entered an Order on September 9, 2005, ordering each party to pay his or her own attorney's fees, and the husband then again appealed his case to this Court and raises the following issues:

1. Did the trial court err in finding the 4.9 acre tract to be wife's separate property?

2. Did the trial court err in its distribution of the parties' property?

3. Did the trial court err in allowing wife to leave the remainder interest in her share of the Postal Service pension to her children rather than allowing

[1]The wife built a house on the property in 1996.

it to revert to husband?

The husband asserts that the Trial Court erred in finding that the 4.9 acre tract of property was the wife's separate property. The proof on this issue was that wife purchased the property at the Clerk and Master's Sale on February 12, 1982 for $7,500.00. The Clerk and Master's Deed was made out to the wife as grantee. At trial, the wife and their son, Willy, testified that she bought the property on Willy's behalf with his money. Later, the wife deeded all of her interest in the 4.9 acres to the son, Willy, and the son sold the property to a third party in 2001 with the affidavit on grantor's deed indicating the property was valued at a little in excess of $32,000.00.

Tenn. Code Ann. §36-4-121 defines separate property as:

> (A) All real and personal property owned by a spouse before marriage, including, but not limited to, assets held in individual retirement accounts (IRAs) as that term is defined in the Internal Revenue Code of 1986, as amended;
>
> (B) Property acquired in exchange for property acquired before the marriage;
>
> (C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1);
>
> (D) Property acquired by a spouse at any time by gift, bequest, devise or descent;
>
> (E) Pain and suffering awards, victim of crime compensation awards, future medical expenses, and future lost wages; and
>
> (F) Property acquired by a spouse after an order of legal separation where the court has made a final disposition of property.

The Trial Court, in its Finding of Facts and Opinion said as it relates to this property:

> The wife, in February 1982, purchased a tract of land from the Clerk and Master of the Chancery Court for 4.902 acres which apparently joins the tract originally purchased by both parties. Although the husband claims this was a purchase by both parties, the proof established that the wife made the purchase for herself. The parties' son attempted to show by his testimony that he had purchased the tract. His testimony is not in any way believed by the Court, but is not material to the findings in this case. As far as this case is concerned, the additional acreage was the wife's sole property.

The Trial Court did not find any facts to support his conclusion that the property was the wife's separate property. The Court's conclusion does not comport with Tenn. Code Ann. § 36-4-121(b)(1)(A) (2005), which defines marital property as:

> All real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing, and owned by either or both spouses as of the date of filing of a complaint for divorce, except in the case of fraudulent conveyance and anticipation of filing and including any property to which a right was acquired up to the date of the final divorce hearing and valued as of the date as near as reasonably possible to the final divorce hearing . . . All marital property shall be valued as of the date as near as possible to the date of entry of the final order dividing the property.

The husband concedes that the property had been conveyed to a third party and cannot be "recaptured" and brought back into the marital state. He argues, however, that he should have received more property in the overall distribution since wife allegedly "dissipated" the marital estate by conveying away her interest in this property. The record shows the wife conveyed a one-half interest in the 4.9 acre tract to Willy in 1986, and quit claimed her remaining one-half interest to the son on November 30, 1999, with the deed being recorded on December 22, 1999 on the day that she filed this divorce action. The Trial Court rejected both Willy and the wife's testimony that she had purchased the tract for Willy, when he held that this tract "was the wife's sole property". Under these circumstances, it is appropriate to take the value of this tract into account in arriving at an equitable distribution of the marital estate. *See*, Tenn. Code Ann. § 36-4-121(b)(1)(A) (2005).

The husband claims the Court's overall property distribution was inequitable, because the wife received her house and lot, and then received half of the value of the remaining property. He argues that he did not intend to make a gift to the wife of the property which he quitclaimed to her, and that this should have been counted as part of her distribution. He argues that a conveyance of property between spouses is not conclusive evidence of a gift, but merely creates a rebuttable presumption of a gift.

However, the husband testified at trial, that he quitclaimed the property to the wife so she could build a house on it, and he knew that by doing so he was relinquishing any interest he had in that property. He explained that he wanted a "reciprocal" piece of property carved out for him from the large tract, and that he had some expectation of receiving same when he quitclaimed the property to his wife. He did not, however, dispute that this was a gift by him to his wife, and as this Court has explained, "gifts by one spouse to another of property that would otherwise be classified as marital property are the separate property of the recipient spouse." *Batson v. Batson*, 769 S.W.2d 849, 856 (Tenn. Ct. App. 1988). To be a valid gift, requires (1) donor's intent to make a gift; and (2) surrender of dominion and control by the donor over the property. *See Hansel v. Hansel*, 939 S.W.2d 110, 112 (Tenn. Ct. App.1996). A conveyance of property between spouses creates a rebuttable presumption of a gift, but this is not conclusive evidence on the issue. *See Turner v. Turner*, 2000 WL 1425285 (Tenn. Ct. App. Sept. 28, 2000); *Dotson v. Dotson*, 2000 WL 688576 (Tenn. Ct. App. May 30, 2000). In these cases, the court found that there was no gift because there was testimony that the conveyance was made solely to shield the property from creditors, or for some other such purpose. In this case, the husband testified that he simply quitclaimed the property to wife so she could build a house on it to live in. As these cases state the issue depends largely the

credibility of the witness, and the trial court's decision is accorded deference in this regard. *See, e.g.*, *Pennington v. Pennington*, 2001 WL 277993 (Tenn. Ct. App. Mar. 14, 2001); *Denton v. Denton*, 2000 WL 682651 (Tenn. Ct. App. May 25, 2000). The husband's evidence failed to rebut the presumption that the deed to the wife was a gift of the property to the wife, and the Trial Court properly found that the house and lot were the wife's separate property.

In this case, the property division was nearly equal, as the Court ordered the remainder of the large tract sold and the proceeds divided equally, and ordered that the pension/retirement accounts would also be divided equally. The husband was given his entire thrift savings plan with the Postal Service as his sole property. Considering the statutory factors, this division was equitable, since the marriage was of long duration, the parties were of the same age and educational level, and both contributed to the marital state. But the Trial Court erred in ruling that the wife's 4.9 acre tract was separate property and did not take the value of that property into account in the overall distribution. Since it was the Trial Court's intent to near equally divide the marital estate, and when the value of the 4.9 acre tract is included as marital property, it is appropriate to modify the Decree by awarding the husband $16,000.00 from the proceeds of the sale of the remainder of the tract of land the parties purchased in 1971, and then equally divide the remainder after the husband's $16,000.00 is subtracted from the proceeds received from the sale of the land.

Finally, the husband argues that it was error for the Trial Court to order the wife's share of the Postal Service Pension would be her property and thus alienable upon her death, rather than reverting the remainder to the husband at her death. He argues that it is inequitable to allow this benefit to become part of the wife's estate, since it is money he worked to earn, and which could help him in his retirement years. This argument ignores the fact that if this were any other type of property, such as real estate, a bank account, a CD or investment account, etc., it would be the wife's sole property if awarded to her and would unquestionably become part of her estate upon her death. This account is a part of the parties' marital estate which was divided by the Trial Court, and was not an award of support. The husband has advanced no compelling reason for treating this award of property any differently than any other type of property. We conclude this issue is without merit.

The Judgment of the Trial Court is affirmed, as modified and the cause remanded, with the cost of the appeal assessed one-half to Mary Joe Earl Headrick and one-half to William H. Headrick, Jr..

HERSCHEL PICKENS FRANKS, P.J.